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In The
Supreme Court of the United States

CUSTOM SHIP INTERIORS;
FREMONT COMPENSATION INSURANCE GROUP,

Petitioners,

v.

MICHAEL ROBERTS;
BENEFITS REVIEW BOARD;
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The decision of the Fourth Circuit Court of Appeals should not be permitted to stand, as it incorrectly mandates that Courts look to each individual Lonshoremen as to how per diem allowances are spent in order to determine whether or not the per diem payments are *wages* under the Longshore Act.

The Brief for the Federal Respondent in opposition to the Petition of Writ of Certiorari demonstrates exactly why the Petition should be granted as it demonstrates the confusion surrounding the legal standard to apply in determining whether or not per diem payments are *wages* under the Act, or whether or not they are simply reimbursements. Because of this confusion in the applicable standard, this Court should directly address how per diem payments should be construed within the Longshore Act's definition of *wages*.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD CLARIFY THE NATURE OF PER DIEM PAYMENTS AS THERE IS CURRENTLY CONFUSION AMONG THE CIRCUITS AS TO WHERE SUCH PAYMENTS FIT WITHIN THE DEFINITION OF WAGES UNDER THE ACT.

This is a case of first impression. Indeed, this Court has not previously articulated a standard with regard to treatment of per diem payments, and while it is true that the Circuit Courts have addressed the issue, they have arrived at different conclusions. *Compare McNutt v. Benefits Review Board*, 140 F.3d 1247 (9th Cir. 1998) *with Custom Ship Interiors v. Roberts* at App. 1. Fortunately, the Statute itself provides all the guidance this Court needs to properly evaluate

whether or not the per diem payments should be considered part of a Claimant's average weekly wage under the Longshore Act. *See* 33 U.S.C.A. §902 (13) (2002). In fact, as the dissenting opinion below articulates, the first part of the Statute defines wages in the traditional sense, as money earned for services rendered as compensation by an employer. App. 11. Yet, the majority opinion below falls flat as it somehow reasons that Mr. Roberts' ability to secure *gratis* room and board with Custom Ships' knowledge transforms the per diem reimbursements into compensation for services rendered.

In attempting to rationalize the Fourth Circuit's opinion, the Federal Respondent's Brief appears to advocate some sort of "reasonable" standard in determining whether or not per diem payments should be calculable as wages. Resp. Brief at P. 12. Therein, the Respondent attempts to distinguish *McNutt v. Benefits Review Board*, 140 F. 3d 1247 (1998), stating that there is no indication in the Court's opinion that the per diem was anything other than a "reasonable approximation" of board and lodging expenses the employer expected the employee to incur.

The Federal Respondent's footnote also asserts that since the Court below did not express a view concerning the "reasonable approximate expenses" of an employee, that the Fourth Circuit's decision would not result in differential treatment. Id. at fn. 7. However, this reasonable approximation standard advocated by the Respondent is not supported by the language of the Statute, and would certainly result in a case by case analysis of the intent of a particular employer's per diem payment, and whether or not they knew (or perhaps "should have known") what the employee's living and eating arrangements were. This would mean that an employer would constantly have to monitor its employees to determine their rate of spending, and whether or not their spending was on par with a

hypothetical "reasonableness" standard. Indeed, the Federal Respondent added to its question presented the statement "...when the employer knew that the employee was incurring no board or lodging expenses during his assignment because the cruise line on whose ship he was working provided him with free board and lodging." Resp. Brief at (I).

By making the employer's knowledge a factor, the purpose of the Statute to simply calculate wages as compensation for services rendered is disregarded and avoided, and has the effect of forcing courts to embark on a cumbersome analysis of the employer's intent and what is "reasonable" as a per diem. As it was stated in the Petition, this would then require courts to launch into an investigation as to exactly how lavishly or frugally a Lonshoreman spent his or her per diem, which is a pitfall that the dissent below recognized and wanted to avoid by simply adhering to the plain language of the Statute and joining the *McNutt* decision. App. 10-12.

Therefore, because the position embraced by the Federal Respondent would necessarily involve an analysis of the "reasonableness" of the per diem and the employer's knowledge of how the per diem was or was not spent, and to the extent that this hypothetical analysis contravenes the plain language of the Statute, the decision of the Fourth Circuit should be reversed and the decision of the Administrative Law Judge reinstated per the dissent below.

II. THE DECISION OF THE FOURTH CIRCUIT WOULD PROVIDE A WINDFALL TO CLAIMANTS AND AN UNINTENDED FINANCIAL BURDEN ON EMPLOYERS BY UNJUSTLY INCREASING A CLAIMANT'S AVERAGE WEEKLY WAGE.

If the decision of the Fourth Circuit is allowed to stand, employees within the Fourth Circuit will have the potential for unfairly receiving higher average weekly wages than those employees elsewhere in the country, especially the Ninth Circuit. This will also place an additional burden on employers, as under the Fourth Circuit's formula, they would be subject to increased exposure for loss of wage earning capacity claims. The Petitioners herein are not unmindful of this Court's decision in *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291 (1995) cited by the Federal Respondent for the proposition of compensating employees for wage-earning capacity lost because of injury. Yet by the same token, based on the plain language of the Statute, the per diem does not qualify as a *wage*, as it is not compensation for services rendered. Therefore, there is no prejudice to an employee by not having these amounts credited to his wages for loss of wage earning capacity purposes.

Unfortunately, the Fourth Circuit's decision will generate in depth scrutiny of employers' knowledge or lack of knowledge of their employees per diem spending habits, which has no connection with the wages the Longshoremen earn for services rendered. Thus, employers in the Fourth Circuit who pay per diem payments will likely have more exposure than their counterparts elsewhere, which is not the intent of the Act. Indeed, the Longshore Act was created in order to establish a system of uniform Workers' Compensation coverage for Lonshoremen. *See, e.g., Davila-Perez v. Lockheed Martin Corp.*, 202 F. 3d 464 (1st Cir. 2000);

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 266-67 (1977). However, a system of compensation cannot be uniform when one Circuit is treating the average weekly wage issue differently from another Circuit or the rest of the country. *Cf. Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920) (acknowledging the Constitution's intent to empower Congress to legislate within its Admiralty and Maritime Jurisdiction to preserve proper harmony and uniformity in maritime matters).

CONCLUSION

The Court should grant this Petition and directly address the conflict among the circuits regarding how to apply per diem payments in the context of *wages* under the Longshore Act.

Respectfully Submitted,

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